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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

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In the Matter of	)	
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Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules	)	**CS DOCKET NO. 95-178**

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To: The Commission

REPLY COMMENTS

The Federal Communications Commission issued a Notice of Proposed Rule Making (the "Notice") in the above-captioned matter on December 8, 1995, seeking comments on its proposal to revise the definition of broadcast television markets for purposes of cable television carriage rules. United Communications Corporation ("United"), by its counsel, submits this reply to comments filed in this matter.

United is the licensee of television broadcast stations KEYC-TV, Channel 12, Mankato, Minnesota, and WWNY-TV, Channel 7, Carthage (Watertown), New York. United previously submitted its comments on the Commission's proposed rule making, and now responds to the comments submitted by others.

Background

The Cable Act of 1992[1] allows broadcast television stations to elect between requiring cable systems in their local markets to carry their signals ("must-carry") and permitting the systems to carry their signals only with the stations' consent ("retransmission consent").[2] This election is repeated every three years.[3] The next election is to be made by October 1, 1996.[4] The current regulations provide that the definition of a television station's local market is to be updated every three years, coordinated with the election cycle.[5]

The market definitions were originally based expressly on "Areas of Dominant Influence" ("ADIs") as defined by the Arbitron Company ("Arbitron").[6] However, Arbitron has abandoned the business of monitoring television audience sizes, and therefore no longer updates its determination of ADI boundaries. Thus, the Commission issued the Notice to propose a new mechanism for defining stations' markets.

The Commission set forth three options for defining local markets of broadcast television stations: 1) substitute Nielsen's current "Designated Market Areas" ("DMAs")

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[1] The Cable Television Consumer Protection and Competition Act of 1992. Pub. L. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

[2] Communications Act of 1934, § 614, added by section 4 of the 1992 Cable Act.

[3] Communications Act, § 325(b)(3)(B).

[4] 47 C.F.R. § 76.64(f)(2).

[5] 47 C.F.R. § 76.55(e), Note.

[6] *Id.*

for the old ADIs; 2) continue using Arbitron's ADIs from 1991-92; and 3) retain ADIs for the 1996 election and use DMAs thereafter.

Most commenters advocated substituting current DMAs for the outdated ADIs. Numerous arguments were advanced to support this position. Commenters emphasized the importance and benefits of a system based on market definitions that are more accurate. Use of DMAs is the simplest means of following changes in market areas. In addition, many noted that adoption of DMAs is consistent with Congressional intent, the Commission's prior analysis of this issue, and Commission action in other market-based matters.

Nevertheless, a few commenters, who oppose must-carry anyway, wanted to keep using the four-year-old ADI definitions. These dissenters are comprised mainly of cable systems and their representatives. The main arguments advanced for maintaining the status quo were "stability" and the supposed convenience of cable viewers.

Discussion

I. Whether "stability" is more important than accuracy in television market definitions.

In choosing between the Notice's options, the core issue is whether "stability," that is, freezing market definitions in the past, is more important than using market definitions that accurately reflect current viewing habits and preferences and will automatically adapt to future changes.

Despite the preference for stability professed by a few cable operators in this proceeding, cable systems frequently change channel lineups to adjust to changes in viewer choices. The number and identity of cable television offerings on the various systems is constantly changing. The payments offered by program networks to cable operators change from time to time, causing operators to drop one program and add another. New channels are being offered to the systems. The cable systems understandably respond by modifying their offerings. "Stability" has not been, nor should it be expected to be, the guiding principle of cable system lineups.

The commenting cable systems oppose updating the market definitions because they do not want to adjust their channel lineups for changes in the local television market. However, perpetuating the 1991-92 market definitions will not prevent cable viewers from being subject to any further channel changes. Cable systems can and will continue to make changes in the programs carried on their systems.

The cable systems also argue against updating market definitions because of the fear that use of current market definitions might require some of them to carry additional local stations. This, they complain, would force them to drop "popular" cable channels to carry newly required local broadcast channels. This argument is overwrought and false.

Some cable systems have unused channel capacity and would not have to drop any channels. Any system already carrying the maximum number of local stations required under the regulations[7] would not have to add any additional local channels. Further,

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[7] 47 C.F.R § 76.56(b).

despite the suggestion in some comments,[8] no system would have to carry a more distant affiliate of a network for which it already carries a closer affiliate.[9]

Congress itself has already decided that stability should be a lower priority in this area than currency and accuracy. The 1992 Cable Act specifically provided broadcast stations the opportunity to update their must-carry elections every three years.[10] In addition, the 1992 Cable Act established the process whereby a station's market definition could be changed to reflect more accurately the station's viewership.[11]

Accuracy in the definitions of television markets is also more consistent with the purpose behind the must-carry provisions. Freezing market definitions in the past does violence to the public policy behind must-carry. The must-carry option was instituted to

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[8] Cox Communications, Inc. complains in its Comments, at 5, that "Flagstaff, [Arizona] stations already have begun requesting carriage for the 1996 election period on Cox's Phoenix system." At least one of Flagstaff's two television stations (KNAZ-TV) is an affiliate of the NBC network. Cox already carries the broadcasts of the Phoenix affiliate of NBC.

Additionally, Cox could use a special petition under Section 614(h) of the Communications Act to modify the market definition of the Flagstaff stations so that Phoenix would not be with their market area: neither Flagstaff station has been historically carried on the Phoenix system, the stations do not provide local service to Phoenix, many other stations serve Phoenix, and the Flagstaff stations are not viewed in Phoenix. *See* Communications Act, § 614(h)(1)(C)(ii).

The National Cable Television Association, Inc., in its Comments, at 8, argues that WHAG, Hagerstown, Maryland, "would gain over 1.5 million additional TV households" by its change from the Hagerstown ADI to the Washington, D.C. DMA. However, WHAG is an affiliate of the NBC network. Since the same network already has a Washington, D.C. station as an affiliate, Washington area systems would not be required to carry WHAG.

[9] 47 C.F.R. § 76.56(b)(5).

[10] Communications Act, § 325(b)(3)(B), added by 1992 Cable Act, § 6.

[11] Communications Act, § 614(h)(1)(C), added by 1992 Cable Act, § 4.

ensure that smaller local broadcast television stations would be available to the viewing public even if the cable systems did not see fit to compensate the broadcasters for use of their signals.[12]

The area in which a station can exercise its must-carry option must be accurately drawn if must-carry status is to be fairly exercised. Cable television subscribers view cable signals almost completely to the exclusion of signals received over the air. Subscribers seldom take the trouble to switch back and forth between the cable connection and an antenna. Instead, they consistently view the local broadcast stations through the cable retransmission of those stations. Therefore, it is imperative that local broadcast stations are carried in their service areas in order to fulfill the purpose of their spectrum allotments. They can hardly be expected to serve their communities if their signals are not available throughout their local markets. This is most fairly accomplished by use of the best objective definition of the local markets, namely, the regularly updated DMAs as determined by Nielsen.[13]

Any disruption to cable viewers from replacing old ADIs with current DMAs will be minimal. It will merely be comparable to the disruption that the industry was bound to expect had Arbitron continued publishing ADI definitions, making a set of ADI definitions for 1994-95 available for purposes of the 1996 must-carry election. This is the

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[12] H.R. Rep. No. 102-628, 103d Cong., 2d Sess. 97 (1992).

[13] It is significant that the Cable Telecommunications Association (CATA), which otherwise proposes the continued use of the 1991-92 ADIs, recognizes that a station's ADI is not the "fairest method of defining 'local.'" CATA Comments at 2.

procedure specified in the current regulations. Furthermore, the improvement in the accuracy of the market definitions by adoption of current definitions greatly outweighs any disruption that does occur.

II. The DMA market definition makes the most efficient use of public and private resources.

Most commenters noted that, regardless of the use of ADIs or DMAs, the market definitions can be refined by special petition to the Commission. This procedure is specified in Section 614(h) of the Communications Act and is implemented by Section 76.59 of the Commission's rules.

This special proceeding, however, should not be relied on to ameliorate problems and injustices resulting from use of out-dated market definitions. The Commission will make best use of its limited resources, as well as the resources of the stations and systems involved, if it selects the market definition that will require the least additional refinement through the special petition process.

The market definition that satisfies this requirement is the one that most accurately reflects current market conditions and adapts to future changes without necessitating further Commission proceedings. This market definition is based on use of regularly updated DMAs.

The National Cable Television Association ("NCTA") cites in its Comments, at 7, an example that proves this point. It is the definition of the Mankato, Minnesota, market.[14] Under the old ADI definition, only three counties were included; the current DMA for Mankato covers six (and part of a seventh). Without any further analysis of the Mankato market, NCTA concludes that these facts demonstrate that adoption of the DMA definition is contrary to "the public interest in maintaining stability and some degree of certainty . . .."

Unfortunately, the NCTA falls far short of presenting a complete picture of the Mankato market. The one local station, KEYC-TV, is significantly viewed in all six counties of the DMA. In fact, it is the most viewed station in those counties. The three counties in Mankato's DMA but not in Mankato's ADI were regulated to the Minneapolis-St. Paul ADI in recent years by the questionable methods of Arbitron,[15] but they are all further from the Twin Cites than is Mankato. Moreover, they are <u>all</u> outside the Grade B coverage contours of any of the Minneapolis-St. Paul stations.

KEYC-TV has been on the air since 1960, covering local news and issues of concern to the three counties that the metropolitan Minneapolis stations do not cover. KEYC is the only television station that reports the high school sports scores from the three counties. It is the only station that forecasts weather specific to the communities in those counties. Furthermore, it is the only station that regularly covers and reports on news events in those counties.

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[14] *See also* Comments of United Communications Corp. at 4-5.

[15] On the other hand, for many years, through the early 1980s, the six counties were in the Mankato ADI.

In order for KEYC-TV to petition the Commission to include the extra DMA counties in KEYC's market, KEYC must undertake a series of costly community-by-community surveys of viewing patterns. County-wide data are not acceptable in a Section 76.59 proceeding. Then, the station must proceed through the expensive and time-consuming petition process.

Modification of a station's market definition to reflect the station's unique circumstance can be accomplished, but each petition requires significant expenditures of time and money by the petitioner, other interested parties and the Commission. Therefore, it is preferable for the Commission to adopt the presumptive market definitions that will minimize the need for these special proceedings. Substitution of current DMA definitions for ADI delineations that are four years out of date accomplishes this.[16]

Conclusion

United agrees with the majority of the commenters: It strongly encourages the Commission to adopt the first option discussed in the Notice. Use of commercial market

[16] The Commission should retain any refinement of the market definition for a particular broadcast station accomplished through this special petition process until further changes are effected through another special petition. Any subsequent changes in the general DMA for that area should not overrule the changes made in a special proceeding for a specific station.

definitions that will be regularly updated will be the most efficient means of providing accurate and fair determinations for must-carry elections. For these reasons, the Commission should use Nielsen's DMA determinations of local market boundaries in connection with the mandatory carriage rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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